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August 12, 2021

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Re: Force Majeure Request Tokai Carbon

Dear Sir/Madame:

This is a request pursuant to Paragraph 70 the Consent Decree, lodged on December 22, 2017, among the United States of America, the Louisiana Department of Environmental Quality, the State of Texas, and Sid Richardson Carbon, Ltd. (hereinafter the "CD"). Tokai Carbon CB ("Tokai") is a successor in interest under the terms of the CD. We have previously notified you verbally (other than EPA) and through e-mail (and in the case of EPA, through an electronic submission) of a COVID outbreak among the contractors at Tokai's Borger facility. This has resulted in a delay in Tokai fulfilling its obligations under certain provisions of the Consent Decree, specifically:

- Paragraphs 17, 23, 24, 27 and 31 requiring Tokai to install by April 1, 2021, and continuously thereafter, Continuously Operate, a Wet Gas Scrubber emission control system ("WGS") and a Selective Catalytic Reduction emission control system ("SCR") at its Borger facility to achieve reductions in sulfur dioxide and nitrogen oxide emissions from affected process sources;

- Paragraph 32 requiring Tokai to install, and continuing thereafter, Continuously Operate a WGS to achieve reductions in particulate matter emissions from process sources; and
- Paragraph 37 of the Consent Decree prohibiting Tokai from using flares at its Borger Facility beginning April 1, 2021.

Tokai has used its best efforts to mitigate the impact of this Force Majeure event and requests that the deadlines for the above obligations be extended to August 29, 2021.¹ The COVID situation at the Borger Facility continues to evolve and additional COVID exposures could result in additional delays. However, at this time Tokai projects that an extension to August 29, 2021 will be sufficient to complete the work and would show the following in support of this request.

**A Force Majeure Event Has Occurred Necessitating
an Extension of Certain Compliance Deadlines**

Paragraph 70 of the CD reads:

“Force Majeure,” or the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, its Contractors, or entity controlled by the Defendant that causes a delay or impediment to performance in complying with any obligation under the Consent Decree despite the Defendant’s best efforts to fulfill the obligation including, but not limited to, delays caused by labor strikes, transport delays, and civil unrest, depending on the circumstances of the particular claim. The requirement that Defendant exercises best efforts to fulfill the obligation includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event, (a) as it is occurring, and (b) after it has occurred to prevent or minimize any resulting delay and/or violation and/or emissions during such event to the greatest extent possible. Force Majeure does not include Defendant’s financial inability to perform any obligations under this Consent Decree. Unanticipated or increased costs or expenses associated with the performance of Defendant’s obligations under the Consent Decree shall not constitute circumstances beyond Defendant’s control, nor serve as the basis for an extension of time under this Section and shall not constitute an event of Force Majeure.”

Tokai bases its request on the unforeseen COVID outbreak among contractors at its Borger facility and the resulting scheduling issues and workplace modifications due to the COVID outbreak and additional COVID precautions.

On the afternoon of Friday, July 23, 2021, Crane Services, a contractor at the Borger facility working on the emissions control equipment installation, notified Tokai that one employee had tested positive for COVID. This contract employee’s job function involved hauling in equipment and providing it to the various groups working on the project. Thus, this worker was in contact with the majority of the various contract crews at the Borger Facility.

Crane Services removed all of its crews from the Borger Facility on the afternoon of July 23. Crane Services along with other contractors had been working 24 hours a day, 7 days a week to meet the August 9 extended deadline. Crane Services is a critical path contractor. Crane Services provides, among other things, services to set the pipes and large vessels for the emission control equipment. Their absence from the site results in

¹ These obligations were the subject of a previous Force Majeure event. Tokai and the government entities who were parties to the Consent Decree reached an agreement to extend those deadlines until August 9, 2021. The extension was awaiting signatures at the time of the COVID outbreak and pursuant to a request from DOJ, Tokai withdrew its signature on that agreement pending resolution of the COVID outbreak.

other crews being unable to continue with their work because the pipes and large vessels are not able to be set.

Crane Services informed Tokai that it was arranging COVID testing for all of its workers but that would likely not be completed until early the week of July 26. Crane Services informed Tokai that it completed its testing on Tuesday July 27 and had an additional 2 workers test positive for COVID, bringing its total to 3. Certain workers in close contact with those workers continued to isolate, but Crane Services began returning to the Borger facility with a slightly reduced crew on July 28. As of August 6, Crane Services still had 3 workers in quarantine. One of the workers remaining in quarantine is a large crane operator. This is a highly specialized and skilled position. A replacement operator was located but could not be sent to the site until July 29. Upon his arrival at the site, he had to be oriented to the site and the project, resulting in further delays.

Other contractors similarly removed their workers from the site to evaluate COVID exposure.

- IAC, the mechanical contractor at the site, removed its employees from the site on Friday July 23 to evaluate COVID exposure. IAC has had 5 workers test positive for COVID. IAC began to return to the facility on July 27, but due to the absence of Crane Services from the site, IAC had limited ability to work until Crane Services was back on site. As of August 6, IAC had four workers in quarantine.
- Cleaver Brooks left the site on July 23 to evaluate COVID exposure. Cleaver Brooks is a critical path contractor. It supplies specialty welding services on steam pipes. Cleaver Brooks sent its employees back to their home base in Houston while awaiting the results of IAC and Crane Services testing. They did not return to the site until July 29.

During this time, Tokai has been monitoring its workforce for COVID symptoms. Six workers at the Borger Facility test positive for COVID. These COVID cases in Tokai's workforce has presented a concern at the facility but at this time we do not anticipate that this will adversely impact the project schedule for the emission equipment.

In response to the COVID cases, Tokai and its various contractors have implemented enhanced protective practices at the Borger Facility to minimize the risk of future exposure. The work being performed to install the emission control equipment often takes place in confined, small spaces where it is difficult to socially distance workers. However, Tokai and the contractors have implemented practices to try to minimize the number of workers in an area to the extent possible and to limit "cross exposure" among crews by limiting which workers are in which areas at the same time. This is a prudent practice to reduce the risk of further significant delays and be protective of worker health. This practice however has added at least 18 days to the project schedule as it slows the work overall. On critical path items, this has a cascading effect. For example, slower pipe setting operations delays the welders.

**Tokai Undertook Best Efforts to Comply with the CD
Despite the Force Majeure Event, and Made Every Effort to
Prevent and Minimize the Delay**

After the initial COVID diagnosis on July 23, Tokai undertook its best efforts to avoid and minimize the delays caused by the Force Majeure event. Tokai worked closely with its contractors to determine if additional personnel could be brought in or if alternative crews were available. These efforts did not identify an alternative reasonably likely to result in a reduction in the impact of the Force Majeure event. The project was in its final stages. The current crews were well versed in the project requirements and the upcoming work. Tokai and the contractors determined that locating and training new crews would not

result in any time savings. Tokai and its contractors did bring on a replacement large crane operator as soon as one could be located because the crane operations are critical to all parts of the project.

Further, Tokai has considered whether more contract crews – in addition to those already on site – could minimize the delays. Existing crews were already on the Borger site 24/7. However as discussed above, the works pace for this project was limited and additional personnel would not result in time savings on critical path items. In addition, the need to maintain a safe work environment to minimize risk of further COVID transmission also indicated that additional crews would not result in time savings.

Conclusion

Due to all of the foregoing, Tokai hereby invokes Paragraph 70 of the CD and requests that the pending extension of certain deadlines until August 9 be changed to August 29, 2021 at the Borger Facility. This request arises from events out of Tokai's control. The COVID pandemic and the outbreak at the Borger Facility have made it impossible to comply with the deadlines originally negotiated in the CD and the pending extension. The COVID situation at the Borger Facility remains an evolving issue. Tokai and its contractors continue to closely monitor the workforce for COVID symptoms. Further potential exposures or positive test results could result in further delays.

We appreciate your consideration of our request. As always, we are available to answer any questions or provide additional information if needed.

Sincerely,



Long B. Nguyen